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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 2

HARTFORD-EMPIRE COMPANY, F. GOODWIN SMITH, BARTLETT ARKELL, ET AL.,
Appellants,

VS.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO. No. 4426 CIVIL.

BRIEF ON BEHALF OF CERTAIN MEDIUM SIZED GLASS MANUFACTURING COMPANIES, PETITIONERS HEREIN, WITH RESPECT TO THE REMEDY; APPEARING BY COUNSEL AS AMICUS CURIAE

WALTER H. BUCK,
As Amicus Curiae

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VS.

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SUMMARY STATEMENT OF THE PETITIONERS' POSITION

These medium sized glass manufacturing companies having no adequate research, experimental, or engineering departments of their own and being dependent upon Hartford-Empire Company, one of the appellants herein, to supply such services, appeared below asking an opportunity to be heard on the point of remedy.

As the record shows they had every reason to believe that such an opportunity would be afforded them. However, without warning or notice of any kind, the Court below concluded the entire case and entered a final judgment not only on the issue of the violation of the Antitrust Acts, but also on the remedy.

ARGUMENT

1. The parties hereto are The Buck Glass Company, a Maryland corporation; Latchford-Marble Glass Company, a California corporation; Northwestern Glass Company, a Washington corporation; Chattanooga Glass Company, a Tennessee corporation; Laurens Glass Works, Inc., a South Carolina corporation; Maryland Glass Corporation, a Maryland corporation; Universal Glass Products Company, a West Virginia corporation; The Diamond Glass Company, a Pennsylvania corporation; Foster-Forbes Glass Company, an Indiana corporation, and Pierce Glass Company, a Pennsylvania corporation. All of said parties were parties to a certain motion in this case below; and in addition to these parties, there were joined in said motion J. T. and A. Hamilton Company, a Pennsylvania corporation, and Maywood Glass Company, a California corporation which corporations have meanwhile sold and disposed of their businesses, and also T. C. Wheaton Company, a New Jersey corporation, not a party hereto. The motion is set out verbatim in the record. (R. 6914-6916)

2. All of the parties are medium sized manufacturers of glassware at various locations throughout the United States who have heretofore been supplied by the Hartford-Empire Company, one of the appellants herein, with modern glass-making machinery which has been continually improved, the same being leased to them by leasing agreements which provide for the payment of royalties to the

Hartford-Empire Company; and in addition thereto, the Hartford-Empire Company has supplied these parties with the skilled technical service, both for the installation and the continued proper functioning of said machinery. These facts are conceded. But reference is made on this point to certain stipulations to be found in the record as follows: Tr. 10777, 10783, 10788, 10796, 10838, 10863, 10874, and offer of proof Tr. 10859.

3. That as a result of such services, these petitioners have increased their production of glassware, have reduced the cost of such glassware, and have improved its quality in the areas of business transacted by them. This is shown not only by the testimony of the witness, Epstein, produced on behalf of Hartford-Empire Company (R. 5897-5898) but it is a concessum of counsel for the Government.

In the examination of the witness, Albert R. Hunter, by Mr. Goodrich of counsel for the Hartford-Empire Company, the following appears (R. 5329):

> Mr. Goodrich: "Yes, it does. Will the Government also admit the services increased the production of glassware, reduced the cost of glassware, and improved the quality thereof?"
>
> Mr. Isseks: "I would like to confer with my associates. I think we will. Although I don't think it has anything to do with the issues of the case". (After conferring with associates.) "Yes, the answer is we stipulate it".
>
> The Court: *"All right, that is out"*. (Italics ours.)

4. The record shows beyond controversy that any reasonable person following the proceedings below would have concluded that the Court was first to determine whether or not there had been a violation of the Anti-trust Acts by Hartford-Empire Company. If the Court did find that Hartford-Empire Company had violated those Acts

then the question of remedy would be considered as a later and separate matter. (R. 4959).

The motion of the parties referred to in Paragraph 1 hereof came on for consideration before His Honor, Judge Kloeb, at Toledo, May 13, 1942. (Tr. 11262-11276). No counsel appeared in opposition to the motion except Messrs. Isseks and Apsey for the Government. Counsel for the petitioners made their position plain to the Court as follows:

> "Now on the question of the violation of the Sherman Act I have nothing to say. I am not interested in that point. I am interested in telling Your Honor this, when the time comes, if it does come, for a decree against these people, I would like to be heard on the question of remedy. It may be I cannot do anything to help the Court or to help the people I represent, but I will do my best". (Tr. 11266-11267).

After consideration the following occurred:

> The Court: "I have noted this in your motion. You have moved the Court to agree to have Walter H. Buck to appear as a friend of the Court "and to participate in the argument and in the filing of briefs in the above entitled cause".
>
> Mr. Buck: "Yes".
>
> The Court: "Now whether your argument is oral or in writing *under the present situation* how could you present an argument either orally or in writing and remain within the record?" (Italics ours.)
>
> Mr. Buck: "I didn't understand Your Honor on that".
>
> The Court: "How could you present an argument now orally or in writing and remain within the record?"
>
> Mr. Buck: "Within the record? I couldn't present an argument until I saw what the proposed plan is; then I can present one".

The Court: "What I am directing your attention to is that the motion now asks the Court for leave for you to appear as a friend of the court "and to participate in the argument and in the filing of briefs in the above entitled cause".

Mr. Buck: "Yes, sir".

The Court: "Now, assuming that leave were granted and you were to file a brief this month by the first of June, how could you argue within the record?"

Mr. Buck: "I wouldn't want to file a brief *on the first point,* if Your Honor please, until after Your Honor has made up his mind on the case". (Italics ours) (Tr. 11268-11269).

Immediately following that, Mr. Isseks for the Government addressed the court and referred to the taking of testimony in November, 1941. We quote Mr. Isseks in part: "and at that time Your Honor in rendering an opinion on November 17, stated that it was untimely to take such testimony and Your Honor suggested, at pages 7585-7586 of the record, it might be time enough to consider that testimony after Your Honor's ruling". (Tr. 11269-11270). Following this the court replied (Tr. 11275):

"Now the motion is to permit counsel to appear here as a friend of the court for the purpose of participating in the argument. What argument? Well, the only remaining argument is the argument in the last week in June. To participate, not as a licensee, but to participate in the argument and in the filing of briefs. Now, the only briefs to be filed are the briefs that are due here on June 1st by the defendants. I again repeat, I cannot see how counsel could participate in the argument and in the filing of the briefs and keep within the record unless he base his argument and his participation, whether his argument is oral or in writing, upon the assumption that there is to be a division, a disintegration of the Hartford- Empire Company.

> *"Now, that position, I think is untimely. It seems to me that the motion ought to be overruled, and that if after the briefs have been presented, the argument in, and the court has disgorged himself of an opinion, counsel feels that an argument on the question of remedy may be applicable, with his participation, then the question may be taken up".* (Italics ours.) (R. 6917).

5. To demonstrate to this Court the reason why the petitioners filed their motion below on the point of remedy reference is now made to the testimony and to the statements both of Court and of Counsel for the Government. In Point 4, it will be seen that Mr. Isseks for the Government referred to the taking of testimony on November 17: After a discussion on the point of the admission of certain testimony offered by the Hartford-Empire Company, Mr. Isseks for the Government said (R. 4959):

> "On this question whether Your Honor wants to take this evidence on the issue of dissolution the *practice has been, as I understand it, the Court hears testimony on whether or not there is a monopoly. Then when he decides there is, then he decides if he wants to take testimony on remedy.* I think in the Standard Oil case they sent it back. If Your Honor wants to take testimony now on remedy, we can't object. We did not offer any testimony on remedy because Your Honor has not decided in our favor yet. You may never decide in our favor—we hope you do. If you want to take the testimony now, we have no objection if we understand on what issue it is being offered". (Italics ours.)

Further argument took place and then comes the following (R. 4960-4961); Mr. Isseks:

> "The only thing we came in for was to find out whether Your Honor wanted to take this testimony on the issue of the form of dissolution, if Your Honor

concludes Hartford constitutes an illegal monopoly. On that Your Honor, we have avoided proof because in other cases you do that after Your Honor concludes it. Secondly, Your Honor may have theories as to the form of proof because that is a preliminary something for Your Honor to decide and I doubt if Your Honor wants our advice on this matter whether it is a good time to go into that. The *way it was done in the other cases which were none patent cases, the government offered a plan to the Court then the other side offered a plan and then the Court directed the taking of the testimony before a special master*". (Italics ours.)

(On the same page): Mr. Haight for Hartford-Empire Company said:

"The point is, should there be a dissolution". (R. 4961).

Mr. Isseks for the Government replied:

"That only goes to remedy". (Italics ours.)

Again Mr. Isseks (R. 4962):

"I think the whole question as to what a particular licensee's conduct has been on the issue of dissolution is something that calls for a conclusion. We are now trying to deal with two issues, one, monopoly violation of Section 2, and the other one, restraint of trade, violation of Section 1. *It seems to me we should wait until after Your Honor concludes the case on these issues. If Your Honor decides against the Government on the point of monopoly, there won't be any necessity of the Government putting any proof in. If Your Honor decides in our favor, the Government will have to justify a drastic remedy like that and we will assume Your Honor will have testimony on remedy then rather than now.* But we will abide by Your Honor's ruling and I am sorry to take so much of Your Honor's time". (Italics ours.)

This discussion having ended, the Court ruled against the admission of the testimony then offered by the Hartford-Empire Company whereupon offers of proof were made. (R. 4966-4975). Later when Mr. Goodrich of counsel for Hartford-Empire Company was examining the witness, Albert R. Hunter, the Court said, (Tr. 8186):

> *"Are you not going to the issue of what should be done with the Hartford-Empire Company should the Court find that something should be done?"* (Italics ours.)

This Mr. Goodrich denied. But it is perfectly clear from the Court's own statement the parties all understood that the first thing to be done by the Court was to determine whether or not there had been a violation of the Anti-trust Acts by Hartford-Empire Company. The remedy was to come later.

6. Notwithstanding what has heretofore been set out with respect to the declared and intended separation of the determination of whether or not Hartford-Empire Company had violated the Anti-trust Acts and, thereafter, the question of the remedy reference is now made to the opinion of the Court below (Op. Vol. 160). Referring to the petitioners, the Court said:

> "After the taking of testimony had ceased and while final briefs were being prepared, the Buck Glass Company, a licensee of Hartford and not a defendant herein, filed a motion asking that that company and twelve other companies similarly situated be permitted to intervene for the purpose of enlightening the court on the question of relief, if such question should arise.
>
> "The court was of the opinion then that the movants desired to be heard on the value of Hartford as a servicing and research unit to the licensees, in event dissolution of Hartford was in the mind of the court. Dissolution is not resorted to by the court unless Hart-

ford wills it so. The measures herein adopted by the court are deemed necessary to install competition to the industry, and the court does not believe that either willing or unwilling licensees of Hartford could assist it in the selection of the necessary measures, short of actual dissolution, as long as a semblance of domination over the industry remains".

It is to be noted that the Court says that it was "of the opinion" that the petitioners desired to be heard "in the event *dissolution* of Hartford was in the mind of the court. Dissolution is not resorted to by the court unless Hartford wills it so". (Italics ours). In fact, however, the question of opinion is not apposite when reference was made to the terms of a paper before the court. This is said because the motion below, *in terms,* is contrary to the statement in the Court's opinion. Thus, in Paragraph 3 of the motion, Subparagraph (d), is the following:

> "(d) That if any decree entered herein shall have the *practical effect of destroying or in any way substantially interfering with the services now rendered by the Hartford-Empire Company, defendant, to the parties to this motion and to others,* the result will be that within a few years the medium-sized and small glass manufacturers, including the parties to this motion, being unable themselves to supply such extensive services and to obtain such services as are now supplied to them by the defendant, the Hartford-Empire Company, will be unable to compete with the few large glass manufacturers, who, as aforesaid, are able to supply such services for themselves, and thereby the petitioners herein will be gradually forced out of business, and a few large manufacturers will have a virtual monopoly of the glassware business in the United States through no fault or act of their own". (Italics ours.) (R. 6916).

7. The evidence in this case shows that the income of the Hartford-Empire Company has been largely derived

from the royalties on the glassware produced by the leased machinery covered by the basic patents owned and controlled by the Hartford-Empire Company at the date of said judgment. This is made clear in the affidavit of F. Goodwin Smith (R. 7582).

8. The final judgment below of October 8, 1942, after determining that the Hartford-Empire Company and certain other defendants had monopolized and conspired to restrain trade in violation of Sections 1 and 2 of the Sherman Anti-trust Act, enjoined said parties from such violations in the future. The judgment also cancelled all of the machinery leasing and licensing agreements made by the Hartford-Empire Company with the parties hereto and others (Paragraphs 27 & 28 of the judgment, R. 7670-7671). It also required the Hartford-Empire Company to sell such machinery at reasonable prices to any applicant. (Paragraphs 22 and 23 of the judgment, R. 7666, 7667). In addition, the judgment required the Hartford-Empire Company to make available to any applicant drawings and patterns, both for machinery covered by patents and patent applications owned or controlled by the Hartford-Empire Company at the date of said judgment and also on any such patents or patent applications filed subsequent to such date. (Paragraph 24(c) of the judgment, R. 7668). Said judgment also required, with respect to machinery covered by any patent or patent applications owned or controlled by the Hartford-Empire Company at the date of said judgment, that the same should be licensed without royalty or charge of any kind. (Paragraph 24(a) of the judgment, R. 7667-7668). With respect to machinery, however covered by any patents or patent applications filed subsequent to the date of said judgment, the same could be licensed at reasonable royalties. (Paragraph 24(b) of the judgment, R. 7668).

9. The stipulations referred to in Paragraph 2 hereof show that the medium-sized glass manufacturing companies have been able to keep their plants in a modern competitive position only because of the services supplied by the Hartford-Empire Company. Said stipulations also show that some of the medium-sized glass companies were in a precarious competitive condition until the Hartford-Empire services were supplied. The judgment of October 8, 1942, *permanently enjoined all violations of the Anti-trust Acts and made available to all applicants on equal terms without restrictions of any kind the patented machinery owned or controlled by the Hartford-Empire Company*, and the Court retained a continuing jurisdiction in the matter. (Italics ours.) What good purpose, therefore, from the standpoint of law or of the public could be served by that provision in the judgment which, having terminated the principal source of income of the Hartford-Empire Company, will leave that company unable to keep the medium-sized glass manufacturing companies in the competitive glassware field thus eventually resulting in their destruction and leaving that field in the control of a few large glass manufacturing companies which are able to and do maintain their own technical research and experimental departments.

10. It is submitted that retribution finds no place in the system of equity jurisprudence. If the Court's judgment below is affirmed on the point of the violation of the Anti-trust Acts, there would seem to be no point in singling out the medium-sized glass manufacturing companies for what would appear to be eventual destruction entailing, as that destruction would, a disturbance in the economic life of a wide area in this country.

11. Thus, if violations of the Anti-trust Acts on behalf of the Hartford-Empire Company are found by this Court,

it is believed that the ends of fairness and good judgment would both be served by remanding the case with, among other things, directions which permit the petitioners and others to adduce testimony and be heard in support of the position taken herein.

CONCLUSION

For the reasons herein above set forth, it is respectfully submitted that, if the judgment of October 8, 1942, is affirmed with respect to the violations of Sections 1 and 2 of the Sherman Anti-trust Act by the Hartford-Empire Company, the judgment, with respect to the remedy, should be reversed and the case remanded with directions permitting the petitioners to take testimony and be heard on such remedy.

Respectfully submitted,

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